In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1017

LOUIS IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. E–Q) is reported at 354 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1965. A petition for rehearing was denied on January 27, 1966. The petition for a writ of certiorari was filed on February 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a specific intent to influence an official act is an essential element of the statute (18 U.S.C. 201(f)) punishing payments to public officials "for or because of any official act."

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2. Whether 18 U.S.C. 201(f) is unconstitutionally vague.

3. Whether petitioner's grand jury testimony was properly admitted in evidence.

STATUTE INVOLVED

18 U.S.C. 201 (76 Stat. 1119) provides in pertinent part:

> (a) For the purpose of this section:
>
> * * * * *
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> * * * * *
>
> (f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York of paying $400 to Jeanne Lupesco, an employee of the Internal Revenue Service for or because of her official act in

auditing income-tax returns. He was sentenced to imprisonment for one year.

The evidence showed that on May 27, 1963, petitioner, a certified public accountant, came to the Internal Revenue Service office to discuss the audit of the income-tax returns of four taxpayers with Jeanne Lupesco, an office auditor. Miss Lupesco prepared a work sheet on the first return and informed petitioner what amounts would be disallowed. Petitioner replied, "Can you do a little better? * * * Look Jeanne, I have four cases. I will give you $100 apiece provided I can tell you what the disallowances are." Miss Lupesco agreed and prepared four work sheets which corresponded with the disallowances suggested by petitioner (R. 21–23). On previous occasions, petitioner had given Miss Lupesco theatre tickets, perfume, costume jewelry and magazine subscriptions (R. 71–75). He had also given money to two other agents for favorable audits (R. 82–83, 115).

On June 17, 1963, a fellow employee picked up an envelope for Miss Lupesco at petitioner's office. After petitioner gave the employee the envelope he introduced the employee to his partner and said, "If you ever need a favor in group 82, he is the man we can contact." The employee, who was acting as an undercover agent, gave the envelope which contained $400 to Miss Lupesco (R. 154–157).

ARGUMENT

1. The applicable statute, 18 U.S.C. 201(f), makes it a crime for anyone to make any payment to a public official "for or because of any official act per-

formed or to be performed by such public official". Section 201(b) defines official act to include "any decision or action" on any matter pending before a public official in his official capacity (*supra*, p. 2). An examination of the entire statutory scheme demonstrates that Congress intentionally chose not to make intent to influence official action an essential element of the offense.

The statute was enacted by Congress in 1962 as part of a bill "to strengthen the criminal laws relating to bribery, graft, and conflicts of interest * * *. Senate Report No. 2213, 87th Cong., 2nd Sess., p. 1. The bill contained a variety of sanctions appropriate for different degrees of delinquency. Section 201(b)(1) proscribes payments with the intent "to influence any official act," and fixes a maximum penalty of fifteen years' imprisonment. Section 201(f) relates to payments "for or because of any official act" and provides a maximum penalty of only two years. The more serious offense in section 201(b) is different, therefore, from the lesser offense in section 201(f), and it would eradicate this distinction to construe section 201(f), as petitioner contends, to require an intent to influence official action. Moreover, the House Committee report expressly states that a distinction was intended between bribes exchanged corruptly, with intent that action shall be influenced (sec. 201 (b), (c), (d), and (e)), which merit severe penalty, and payments "for or because of" action (sec. 201 (f), (g), (h), and (i)), which merit a lesser penalty. H. Rep. No. 748, 87th Cong., 1st Sess. p. 17.

Nor do the statements in the legislative history of

the bill regarding the receipt of gifts by government employees (Pet. 12–14) support petitioner's contention. A payment because of any "action on a matter pending" before a public official is not a "gift" in the sense discussed by Senators Hruska and Keating; it is a payment for services rendered, even if it does not bear all the corrupt earmarks of bribery. The rejected amendment offered by Senator Keating went beyond the enacted bill in proposing restrictions against the receipt of gifts of any sort, even if they were not tied to official acts. Since such gifts are not illegal under section 201(f), the statements cited by petitioner are not inconsistent with the plain meaning of the statute or the construction given it in this case. See S. Rep. No. 2213, 87th Cong., 2d Sess. p. 19.

It follows that the court properly instructed the jury on intent when it said: "In short, this crime does not require the evil intent or the corrupt intent that the first crime requires, nor does it have to have as a purpose the intent to influence the public official but rather to have as a reason for the giving of the money the performance by the recipient of some official act, namely the audit examination of the returns in question" (R. 292–293).

2. Section 201(f) in proscribing payment "for or because of any official act" gives fair warning of the acts which it proscribes. The statute itself defines "official act" to include "any decision or action" on any matter pending before a public official in his official capacity (*supra*, p. 2). It is a matter of common knowledge that a payment, however motivat-

ed, to a public official for or because of any action on a matter pending before him may be detrimental to the government. Petitioner paid money to a government employee for auditing income-tax returns and he has no basis for complaining that he could not reasonably understand that such conduct was proscribed by the statute. See *United States* v. *National Dairy Corp.*, 372 U.S. 29, 31–33. There is surely no similarity between such a payment and the hypothetical cases cited by petitioner (Pet. 7–8).

3. On January 31, 1964, petitioner appeared under subpoena before the grand jury. He was advised that he had a constitutional right not to answer any questions. When asked if he understood he had a right to consult with counsel, he replied, "Yes, sir, you told me that before." He was informed that the grand jury was inquiring into violations of 18 U.S.C. 201 and was "inquiring into specifically your bribery or giving of money to various federal employees in connection with tax matters." He was also told that the grand jury or another grand jury "may vote an indictment charging you with such violations." After being so advised, petitioner denied giving any money to Jean Lupesco. At the trial, this testimony was admitted into evidence (R. 173–175).

The contention that this testimony should have been excluded was properly denied by the court of appeals. Although he asserted a general objection, the only specific objection made by petitioner's counsel appeared to be related to the fact that petitioner had reappeared before the grand jury on the following day (R. 173). Moreover, as a certified public ac-

countant, petitioner had represented taxpayers before the Treasury Department. The statement that he understood that he could consult with counsel could properly be credited by the grand jury. Having been fully warned that the grand jury might vote an indictment against him, he was not deceived as to whether he was a "target" of this investigation when he was called. See *United States* v. *Annunziato,* 293 F. 2d 373, (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Winter,* 348 F. 2d 204, 206–208 (C.A. 2), certiorari denied, 382 U.S. 955.

Equally without merit is the claim that the government should have not have been allowed to introduce this testimony without introducing the testimony given by petitioner before the grand jury on the following day. As the court of appeals observed with regard to the following day's testimony (Pet. App. 0), "Essentially all of the testimony which [petitioner] gave to the grand jury consisted of his claims of privilege against self-incrimination. There was virtually no substantive testimony given." In any event, government counsel inquired whether petitioner wanted "the minutes of the next day" to be offered in evidence, and petitioner's counsel responded that he merely wished "to see them" (R. 173). Since the second day's minutes contained nothing more than the claims of privilege, the failure to produce them for inspection was not prejudicial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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